

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Harold L. Phelan,
on behalf of Kimberly P. Mayfield

Plaintiff,

v.

U. S. Department of Housing
and Urban Development,

Defendant.

Civil Action No: _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Harold L. Phelan (“Phelan”) brings this action on behalf of Kimberly P. Mayfield (“Mayfield”) to compel the U.S. Department of Housing and Urban Development (“HUD”) to produce records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. The records at issue concern Mayfield’s discrimination complaint currently pending with the Equal Employment Opportunity Commission (“EEOC”).

JURISDICTION AND VENUE

2. This Court has jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Phelan, a retired Texas state district judge and co-counsel in this proceeding, represents Mayfield in her EEOC complaint and resides in Granbury, Hood County, Texas. He made the FOIA request at issue in this action.

4. Mayfield, an attorney for HUD in Fort Worth, Texas, and co-counsel in this proceeding, resides in Burleson, Johnson County, Texas. The FOIA request at issue in this action was made on behalf of Mayfield and relates to her EEOC complaint against Defendant HUD.

5. Defendant HUD is an agency of the United States. HUD has possession or control of records responsive to Plaintiff Phelan's FOIA request. Pursuant to Fed. R. Civ. Proc. 4(i) proper service on HUD is by certified mail to: (1) the Attorney General of the United States, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; (2) U.S. Attorney's Office, Civil Division, Burnett Plaza Suite 1700, 801 Cherry Street, Unit #4, Fort Worth, Texas 76102-6882; and (3) Office of General Counsel, U.S. Department of Housing and Urban Development, 451 7th Street S.W., Washington D.C. 20410.

FACTS

6. On March 11, 2019, Mayfield timely filed a Request for Hearing with the EEOC, Dallas District, to decide her discrimination complaint against HUD based on sex and age after she was not selected, on or about March 27, 2018, for the position of Associate Regional Counsel for Litigation ("ARC Litigation") in HUD Office of General Counsel ("OGC"), Region VI in Fort Worth, Texas.

7. On March 30, 2019, Mayfield received the Record of Investigation ("ROI") for the first time and determined that HUD interfered with the investigation of her EEO complaint by, among other things, failing to require several HUD officials to answer and/or respond sufficiently to many of the EEO investigator's affidavit questions, excluding material and relevant documents from the EEO investigation and ROI, and improperly redacting information in the ROI. Accordingly, on May 2, 2019, Mayfield filed a motion to amend her EEOC

complaint to include a claim based on HUD's improper processing of her discrimination complaint.

8. Due to HUD's failure to properly investigate Mayfield's discrimination complaint and due to the fact that no Administrative Judge has been appointed in her EEOC case, and, upon information and belief, will not be appointed for over a year, Phelan requested authenticated copies of the following HUD documents that relate to Mayfield's claim that Marcus R. Patton ("Patton"), the selectee for ARC Litigation, was unfairly and improperly favored and/or pre-selected for the position:

- (a) All documents showing justification for HUD's hiring Patton as a Trial Attorney in 2011 at a Grade 14, Step 8, including, but not limited to, the competing offer from a private law firm in the amount of approximately \$140,000/year;
- (b) All documents showing promotions and awards issued to Patton, including, but not limited to, all SF-52's, SF-50's, and performance certificates;
- (c) All documents showing Patton's appointment as a Special Assistant United States Attorney ("SAUSA") for the District of Columbia;
- (d) All documents showing Patton's appointment as a SAUSA for the District of West Virginia; and
- (e) All documents showing requests and authorizations for training for Patton from January 2017 to present, including, but not limited, to all SF-182's and emails and other correspondence from OGC supervisors, managers and/or senior level executives, recommending Patton's attendance at the Supervisory Development 2: Learning to Lead ("Supervisory Development 2") provided by the Office of Personnel Management ("OPM") in July 2017, and the Treasury Executive Institute Leadership Courses in 2018.

9. On May 31, 2019, Phelan sent his FOIA request via email to Katherine Varney, HUD's counsel in Mayfield's EEOC complaint. Because Varney failed to acknowledge receipt of the FOIA request, Phelan later sent his request via Certified Mail, Return Receipt Requested, to Varney's office in Region VII, Kansas City, Kansas. On June 3, 2019, Varney sent Phelan an

email acknowledging receipt of his FOIA request and informing him that his request had been submitted to Frederick Brisco, the FOIA Officer in Region VII.

10. On June 7, 2019, Phelan sent Brisco an email clarifying his request for documents showing justification for HUD's hiring Patton in 2011 at a Grade 14, Step 8 to include, but not limited, to, the following information:

- (a) the job vacancy announcement, or other documentation, showing the qualifications for the attorney position in HUD OGC in Fort Worth that Patton applied for in 2011;
- (b) Patton's salary history at the time he applied for the attorney position at HUD OGC in Fort Worth in 2011, including his existing salary at Kelly, Hart & Hallman, L.L.P.;
- (c) the justification letter and/or memorandum from the head of HUD, or other HUD official, to the Office of Personnel Management ("OPM"), seeking approval to appoint Patton at a Grade 14, Step 8 in 2011;
- (d) OPM's approval to permit HUD to hire Patton in 2011 at a Grade 14, Step 8; and
- (e) the selection justification letter, memorandum, and/or other documentation from the OGC selecting official, justifying Patton's selection as a HUD attorney in 2011 at a GS-14, Step 8.

Brisco acknowledged receipt of this email on June 10, 2019.

11. On June 11, 2019, Bradley E. Streeter, Senior Management Analyst, Region VII, informed Phelan that he had been assigned to process the FOIA request, that the tracking number of the FOIA request was 19-FI-RO7-01333, and that the target date for completing the FOIA request was July 3, 2019.

12. On July 2, 2019, due to alleged "unusual circumstances" and upon advice of HUD counsel, Streeter extended the twenty-day response time for an additional ten business days with a new target date of July 18, 2019. HUD failed to respond within the extended ten day time period. Thus, on July 22, 2019, Phelan asked Streeter to inform HUD counsel that if he did not

receive HUD's determination by July 25, 2019, Phelan planned to file a complaint in federal district court.

13. On July 24, 2019, Streeter sent HUD's determination to Phelan via email, granting his request in part. Streeter also sent Phelan approximately 244 pages of documents in four separate emails, without any index or identification.

14. HUD redacted all information showing the amount and nature of Patton's promotions and awards, the amount of Patton's prior law firm salaries, and the amount of Patton's alleged competing law firm offer in 2011. HUD asserted that release of the redacted portions would constitute an unwarranted invasion of privacy and therefore, withheld the information under FOIA exemption 6, 5 U.S.C. § 552(b)(6).

15. Additionally, HUD, without providing any details or referencing any specific requested document, stated "[i]t is considered a denial of information when it is unable to provide all the requested information because the documents are either not available or not maintained in the agency's system of records."

16. Upon information and belief, Patton has been awarded numerous performance certificates at public events held by OGC, including, but not limited to, a certificate honoring him and several other young attorneys in Region VI in March 2018. HUD, however, failed to release any of Patton's performance certificates or state the basis for withholding such documents.

17. Upon information and belief, Patton also has requested and/or attended numerous trainings, seminars, and/or conferences since January 2017, including, but not limited to, at least two since April 2019. HUD, however, only released three SF-182's, showing Patton attended OPM's Supervisory Development 2, which was authorized by OGC on June 22, 2017; a two

hour online course by Treasury Executive Institute Leadership, which was authorized by OGC on January 16, 2018; and OPM's Supervisory Development 1, which OGC authorized on January 17, 2018.

18. On July 26, 2019, Phelan filed an administrative appeal with HUD's Office of General Counsel, Ethics and Appeals Division, in Washington, D.C., challenging HUD's partial denial of his FOIA request.

19. Phelan specifically challenged HUD's invocation of Exemption 6 to withhold: (1) the actions requested, the nature of the actions, the total salary/awards, and the bargaining unit status in Patton's SF-50 and SF-52 forms; (2) Patton's prior salary information shown on his job application for the Trial Attorney position that he was initially hired by HUD in 2011; and (3) the pay rate amount in an alleged competing offer on July 25, 2011, which was used by OGC to justify its determination to hire Patton at a Grade 14, Step 8. Phelan argued in both his FOIA request and FOIA appeal that this information is not exempt from production because, under 5 C.F.R. § 293.311, OPM requires the release of federal employees' names, present and past position titles, grades, and salaries (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials). Phelan further argued that the Department of Justice ("DOJ") has recommended the release of information pertaining to the professional qualifications of federal employees including present and past salaries and all awards and honors received. Moreover, in Legal Opinion: GMP-0049, which is on HUD's website pertaining to FOIA requests, HUD required the release of award amounts and bargaining unit status. A copy of DOJ's recommendation and HUD's legal opinion was attached to Phelan's FOIA appeal and is attached hereto as Exhibits 1 and 2, respectively.

20. Phelan also challenged HUD's failure to authenticate the released documents. Phelan argued that under 24 C.F.R. § 15.105(d)(1), HUD is required to make a record available in the form or format requested and thus, HUD should have authenticated the released documents, as requested.

21. Phelan further specifically challenged HUD's failure to disclose all withheld documents and to provide the basis for withholding such documents, the name and title or position of the person responsible for their denial, a brief statement of the reason(s) for the denial, and an estimate of the volume of records or information withheld, if appropriate. Phelan argued that HUD is required, under 24 C.F.R. § 15.105(d)(2), to notify him in writing of any adverse determination, in whole or in part, and the basis for its determination.

22. Phelan also argued that, under 24 C.F.R. § 15.105(d)(2), HUD is required to state in writing whether the following requested documents exist, cannot be located, or have not been retained: (1) Patton's performance certificates; (2) emails and other correspondence from OGC supervisors, managers and/or senior level executives, recommending Patton's attendance at Supervisory Development 2 in July 2017, and/or the Treasury Executive Institute Leadership online course in 2018; (3) all requests and/or authorizations for training for Patton from January 2017 to present, which, upon information and belief, includes Patton's request to attend a management development course offered by OPM in 2019; (4) the justification letter and/or memorandum from the head of HUD, or other HUD official, to OPM, seeking approval to appoint Patton at a Grade 14, Step 8 in 2011; and (5) OPM's approval to permit HUD to hire Patton in 2011 at a Grade 14, Step 8.

23. On August 1, 2019, HUD sent Phelan via Certified Mail, Return Receipt Requested, a letter acknowledging receipt of the FOIA appeal and informing him that HUD would make a determination on his appeal by the close of business on August 26, 2019.

24. On August 26, 2019, despite finding that Patton's "privacy interests are outweighed by the public interest in disclosure of the information," HUD denied Phelan's administrative appeal in whole on the basis that Phelan failed "to articulate a public interest sufficient to outweigh an individual's privacy interest, and the public interest must be significant." HUD did not address Phelan's appeal challenge to HUD's failure to authenticate the released documents; to disclose withheld documents; or to provide the name and title or position of the person responsible for their denial, a brief statement of the reason(s) for the denial, and an estimate of the volume of records or information withheld.

25. Phelan, on behalf of Mayfield, has exhausted his administrative remedies with respect to FOIA request 19-FI-R07-01333.

CLAIM FOR RELIEF

26. Phelan, on behalf of Mayfield, has a statutory right under FOIA, 5 U.S.C. § 552(a)(3)(A), to the records he requested.

27. HUD has failed to produce all the records Phelan requested.

28. HUD has no legal basis for refusing to produce the records and information responsive to Phelan's request or for failing to disclose withheld documents and to provide the basis and the name of the person responsible for such denial.

PRAYER FOR RELIEF

Phelan, on behalf of Mayfield, requests that this Court:

- A. Declare that HUD's failure to provide the records and information responsive to Phelan's FOIA request is unlawful;
- B. Declare that HUD's failure to disclose withheld documents and the basis and person responsible for such denial is unlawful;
- C. Order HUD to make the requested records available to Phelan at no cost and without delay;
- D. Order HUD to disclose withheld documents and to provide the name and title or position of the person responsible for their denial, a brief statement of the reason(s) for the denial, and an estimate of the volume of records or information withheld;
- E. Retain jurisdiction to determine whether HUD's withholding of any subsequently disclosed document is unlawful;
- F. Award Mayfield her costs and reasonable attorneys' fees under 5 U.S.C. § 552(a)(4)(E); and
- G. Grant all other appropriate relief.

Dated: August 28, 2019

Respectfully submitted,

/s/ Kimberly P. Mayfield
Kimberly P. Mayfield (TX Bar No. 15901090)
P.O. Box 1026
Burleson, Texas 76097
(817) 475-0313
kimberlymayfieldlaw@gmail.com

Harold L. Phelan (TX Bar No. 15901000)
306 Peninsula Court
Granbury, Texas 76048
(817) 579-5179
hlphelanlaw@gmail.com

Attorneys for Plaintiffs